Supreme Court, U.S.
FILED
00-1882 MAY 16 2000
OFFICE OF THE CLERK

NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

***PETER HIDALGO AND SAMUEL OLIVERA,***

**Petitioners,**

**vs.**

***UNITED STATES OF AMERICA,***

**Respondent.**

## *PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR PETER HIDALGO AND SAMUEL OLIVERA
2420 CORAL WAY
MIAMI, FLORIDA 33145
TELEPHONE: (305) 854-8529

6 1 PP

## QUESTION PRESENTED FOR REVIEW

I. Whether a trial court may deny as "moot" a motion for new trial based on newly discovered evidence, without an evidentiary hearing when the issues addressed in the motion for new trial were never addressed in any prior order, motion pleading, or hearing?

# TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ..... i
TABLE OF CITED AUTHORITIES ..... v
OPINIONS BELOW ..... 1
JURISDICTION ..... 2
CONSTITUTIONAL PROVISIONS AND STATUTES ..... 2
- Fifth Amendment to the United States Constitution ..... 2
- Rule 33, Fed. R. Crim. P. ..... 3
- Rule 615, Fed. R. Evid. ..... 4

STATEMENT OF THE CASE ..... 5
- A. Basis for Federal Jurisdiction in District Court ..... 5
- B. Statement of Facts ..... 5
  - Introduction ..... 5
  - Proceedings Below ..... 6

ARGUMENT I: ..... 10
- A TRIAL COURT CANNOT DENY AS "MOOT" A MOTION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE WITHOUT AN EVIDENTIARY HEARING WHEN THE ISSUES ADDRESSED IN THE MOTION WERE NEVER ADDRESSED IN ANY PRIOR ORDER, MOTION,

PLEADING OR HEARING ..... 10
CONCLUSION ..... 14
CERTIFICATE OF SERVICE ..... 15

**APPENDIX:**

- Eleventh Circuit Opinion affirming District Court Order entered December 8, 1999 ..... 1-4

- Motion for Reconsideration of Defendant Hidalgo's Second Motion for New Trial, Motion for Evidentiary Hearing, and Supplement to Motion to Compel Production of Tape Recordings from FDC ..... 5-12

- District Court Order Denying Motion for Reconsideration of Order Denying Motion for New Trial, entered February 19, 1997 13-14

- District Court Order denying all pending motions not otherwise ruled upon, as moot, entered on May 6, 1997 ..... 15

- Motion for Clarification of Order

of May 6, 1997 Dismissing as Moot "All Pending Motions Not Otherwise Ruled Upon" and Request for Status Conference, filed May 15, 1997 ..... 16-20

- District Court Order On Defendant Hidalgo's Motion for Clarification of Order of May 6, 1997 Dismissing As Moot "All Pending Motions Not Otherwise Ruled Upon," entered on July 25, 1997 ..... 21-22

- Motion for New Trial Based On Newly Discovered Evidence of Tampering With Physical Evidence and False Testimony at Trial, and Request for Evidentiary Hearing, filed on February 20, 1996 ..... 23-35

# TABLE OF CITATIONS

## TABLE OF CASES:

*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ..... 8
*United States v. Alzate,* 47 F. 3d 1103 (11th Cir. 1995) ..... 12-13
*United States v. Arnold,* 117 F. 3d 1308 (11th Cir. 1997) ..... 13
*United States v. Espinosa,* 918 F. 2d 911 (11th Cir. 1990) ..... 10-12

## OTHER AUTHORITIES:

***United States Constitution:***
AMEND. 5 ..... 2, 6

## UNITED STATES CODE:

***Federal Rules of Criminal Procedure:***
Rule 33 ..... 3, 6

***Federal Rules of Evidence:***
Rule 615 ..... 4, 6, 8-9

## OPINIONS BELOW

The opinion of the Eleventh Circuit is appended hereto in the Appendix (hereinafter "Pet. App.") at 1, and reported at 197 F.3d 1108 (11th Cir. 1999). An unpublished order entitled On Petition(s) for Rehearing and Suggestion(s) for Rehearing En Banc subsequently denied such relief on February 16, 2000.

The appeal to the Eleventh Circuit arose from the Petitioners' Judgments and Commitments and an Orders denying the Petitioners' motions for new trial evidence based upon newly discovered evidence, as "moot." *See* motion, Pet. App. at 23-35. On May 6, 1997, the Honorable Wilke D. Ferguson, United States District Court Judge, Southern District of Florida entered the first order, which denied all pending motions as "moot." Thereafter, upon motion of Petitioner *Hidalgo* for clarification of said order, the District Court Judge entered an Order on July 25, 1997 clarifying that the prior order applied to the motions for new trial that are the subject of the instant petition. *See* motion and order, Pet. App. at 16-20 and 21-22.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 8, 1999. A timely Petition for Rehearing

*En Banc*, as filed on December 29, 1999. On February 16, 2000, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. Thereafter, the Eleventh Circuit issued a Mandate on its Judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

## CONSTITUTIONAL PROVISIONS & STATUTES

### *Fifth Amendment to the United States Constitution*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

***Fed. Rule Crim. Pro., Rule 33. New Trial***

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may--on defendant's motion for new trial--vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

***Fed. Rule Evid., Rule 615. Exclusion of Witnesses***

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**No. _____**

***PETER HIDALGO and SAMUEL OLIVERA,***

Petitioners,

v.

***UNITED STATES OF AMERICA,***

Respondent.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

*Peter Hidalgo* and *Samuel Olivera*, Defendants and Appellants in the courts below, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on December 8, 1999, and for which a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 16, 2000. *See*, Pet. App. at 1-4.

## STATEMENT OF THE CASE

### A. *Basis for Federal Jurisdiction in District Court:*

The District Court was vested with jurisdiction pursuant to Rule 33 of the Federal Rules of Criminal Procedure and the Fifth Amendment of the United States Constitution to entertain the Petitioner's motion for new trial based on newly discovered evidence.

### B. *Statement of Facts:*

• ***Introduction:*** This case raises the following issues of national importance:

**(1)** The Eleventh Circuit, in affirming the denial of the Petitioners' motion for new trial based upon newly discovered evidence and their request for an evidentiary hearing, denied the Petitioners' right to due process and a fair trial. The Eleventh Circuit ignored the trial court's illogical and illegal ruling which denied said motion as "moot" based upon a prior Order denying a motion for new trial based upon the Government's witnesses violation of Rule 615 of the Federal Rules of Evidence.

**(2)** Related to the above issue is whether the Eleventh Circuit improperly denied the Petitioners an evidentiary hearing.

• ***Proceedings Below:*** At trial, the Government presented evidence and argued that the informants' vehicles were vandalized and their tires were slashed. (R21-70-71; R22-8). The informants told Agent Rodriguez that they believed the defendants were responsible for the vandalism, which included the smashing out of the headlights of a Pontiac Bonneville.[1] (R22-8).

At trial, Hidalgo's defense counsel questioned Agent Rodriguez regarding photographs he took that showed that additional glass was missing from the headlights of the Pontiac Bonneville. In response to the questioning, Agent Rodriguez testified:

> Q. On this one what do you see which is -- again, for the record is in evidence PH8?
>
> A. This is the front lens cover of the same vehicle. The glass has now been picked out and you can see some of the glass from [sic] the

---

[1] Evidence showing that this vandalism is fabricated is the subject of the Hidalgo motion for new trial based upon newly discovered evidence filed on February 20, 1996, and subsequent filings which *Olivera* adopted. (R6-459).

ground.

(R22-8). *See also,* Pet. App. at 23-35.

On February 20, 1996, Petitioner *Hidalgo* filed a motion for new trial based upon newly discovered evidence of tampering with physical evidence and false testimony at trial, and a request for an evidentiary hearing, which Petitioner *Olivera* adopted. (R4-459). *See,* Pet. App. at 23-35. That motion argued, *inter alia,* that Agent Rodriguez' lied to the petit jury that the glass was picked out, rather than smashed out with considerable force, was newly discovered ***Brady***[2] evidence that the Government failed to disclose or reveal at trial. *Id.* The Petitioners' discovered this evidence after a forensic scientist conducted an experiment after trial with a Bonneville headlight[3] to determine if Agent Rodriguez' testimony about how the additional glass was removed was indeed feasible. *Id.*

The grounds raised in said motion for new trial were not in any previously filed motion of Hidalgo,

---

[2] ***Brady v. Maryland,*** 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[3] Due to the year, make and model of the vehicle, the lens was not readily obtainable.

*Olivera* or any other co-defendant. *See,* Pet. App. at 23-35.

Nevertheless, on May 6, 1997, after the district court denied Petitioner *Hidalgo's* motion for reconsideration of his prior post verdict motion for new trial based on a violation of F.R.E. 615, the district court summarily denied "as moot" all remaining motions, without specifying that the denial related to motions that did not logically relate to the grounds raised in the motion based upon a violation of Rule 615 of the Federal Rules of Evidence. *See,* Pet. App. at 15.

Due to the ambiguity in the language of the Order, Petitioner *Hidalgo* moved for clarification. *See.* Pet. App. at 16-20. On July 25, 1997, the court clarified that its prior order denied as moot each and every outstanding motion, including those wholly unrelated to the 615 issue. (SR1-577), *See,* Pet. App. at 21-22.

*Hidalgo* and *Olivera* filed a Notices of Appeal. After full briefing in this cause, the Eleventh Circuit entered a published decision on December 8, 1999, affirming the District Court's ruling. However, the opinion failed to provide any reasoning or facts upon which the Eleventh Circuit affirmed the Order denying the motion for new trial based upon newly

discovered evidence. Rather, the Court only addressed an unrelated sentencing issue. *See,* Pet. App. at 1-4.

A timely Petition for Rehearing and Suggestion for Rehearing *En Banc*, as filed on December 29, 1999. On February 16, 2000, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*.

## ARGUMENT I

**A TRIAL COURT CANNOT DENY AS "MOOT" A MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, WITHOUT AN EVIDENTIARY HEARING, WHEN THE ISSUES ADDRESSED IN THE MOTION WERE NEVER ADDRESSED IN ANY PRIOR ORDER, MOTION, PLEADING, OR HEARING.**

### A. *Without an Evidentiary Hearing, The Eleventh Circuit and this Court Lacks Any Record To Address the Grounds Underlying the Petitioners' Motions for New Trial Based Upon Newly Discovered Evidence.*

In ***United States v. Espinosa***, 918 F.2d 911 (11th Cir. 1990), this Circuit set forth a defendant's right to an evidentiary hearing and discovery where a motion sets for newly discovered evidence after trial. In ***Espinosa,*** this Court concluded that the district court abused its discretion in denying the motion for discovery and in denying the motion for new trial without first conducting an evidentiary hearing, and stated:

> For example, discovery might lead to the conclusion that Urso committed perjury

in Espinosa's trial or a related proceeding. It must be remembered that Espinosa alleges Urso is under investigation for his alleged participation in the escape from federal custody of an incarcerated confidential government informant with whose supervision Urso was charged. In the current case, Espinosa claims that Urso willfully secured the unavailability of another Urso-supervised informant. Discovery into the investigation might show that Urso has committed perjury in a proceeding similar to Espinosa's trial. If so, the discovered evidence would be beyond that of mere impeachment and a new trial would be necessary to "remove the taint" from Espinosa's conviction.

Discovery might also enlighten the District Court as to when the United States Attorney's office first learned of the disturbing allegations against Urso. Depending upon when this information was learned, Espinosa might succeed in obtaining a new trial based upon the government's failure to disclose evidence that could have been used to impeach a government witness.

> We further disagree with the District Court's view of the impact this evidence might have at a second trial. True, the testimonies of other witnesses--Bottoms, Winberg, and Agrait--appear to have inflicted the greatest damage to Espinosa's defense. Yet this testimony was hotly contested by Espinosa at trial. Urso's testimony that Espinosa was anxious to complete delivery of the cocaine may have tarnished Espinosa's credibility in the eyes of the jury enough that the jury disbelieved his claims of innocence and instead believed the testimony of Winberg, Bottoms and Agrait.

***United States v. Espinosa,*** 918 F.2d at 913-14 (citations omitted).[4]

---

[4] In ***Espinosa,*** the defendant alleged that subsequent to his trial, one of the agents, Urso, was indicted for making false statements on his federal job application regarding his past use and sale of drugs, and was under investigation for his participation in the escape from federal custody of an incarcerated confidential informant and his alleged distribution of cocaine. The District Court denied Espinosa's motion for discovery and new

Nonetheless, the neither the Eleventh Circuit nor the District Court examined the substance of the allegations.

The allegations set forth in *Hidalgo's* motion showed that Agent Rodriguez engaged in illegal activities and obstructed justice in this case as well as other cases. Where there is a reasonable likelihood that had the jury known that Agent Ralph Rodriguez had testified falsely regarding material aspects of the instant case, with only Agent Rodriguez and Morales placing Petitioner *Olivera* at the Rusty Pelican marina, such evidence could have affected the judgment of the jury. ***United States v. Alzate,*** 47 F.3d 1103 (11th Cir. 1995).

Therefore, in accordance with ***Espinosa,*** the Olivera was entitled to an evidentiary hearing, and this Court's decision herein is in direct conflict with the panel's decision in ***Espinosa*** as well as the disposition in ***United States v. Arnold,*** 117 F.3d 1308 (11th Cir. 1997). Due to the District Court's failure to conduct an evidentiary hearing, the Eleventh Circuit and this Court lack a sufficient Record from

---

trial, and concluded that the newly discovered evidence would be purely impeaching, and in any event, unlikely to lead to a different outcome at trial.

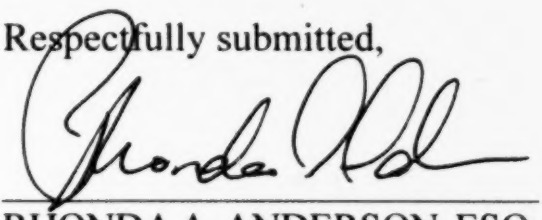
which one could determine if the District Court's denial of the various motions for new trial was an abuse of discretion. Moreover, the District Court failed to make any factual findings upon which its decision was based. *See,* Pet. App. at 15, 21-22.

Accordingly, this cause must be remanded for an evidentiary hearing in order to provide an appellate court with an adequate Record on appeal.

## CONCLUSION

For all the foregoing reasons, therefore, *Peter Hidalgo* and *Samuel Olivera* respectfully submit that this Court should grant this Petition for Certiorari.

Respectfully submitted,



RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
Counsel for *Peter Hidalgo* and *Samuel Olivera*
2420 Coral Way
Miami, Florida 33145
Florida Bar No. 708038
Telephone: (305) 854-8529
Facsimile: (305) 858-8406

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 15th day of May, 2000, to: ***Solicitor General,*** Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; ***Edward Sanchez, Esq., Assistant United States Attorney,*** 99 N.E. Fourth Street, Miami, Florida 33131, and to the ***Office of the U. S. Attorney, Appellate Division,*** Attn: Kathleen M. Salyer, Esq., 99 N.E. 4th Street, Miami, FL 33130.

RHONDA A. ANDERSON, ESQ.
Rhonda A. Anderson, P.A.
Counsel for *Peter Hidalgo* and *Samuel Olivera*
2420 Coral Way
Miami, Florida 33145
Florida Bar No. 708038
Telephone: (305) 854-8529
Facsimile: (305) 858-8406

NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

***PETER HIDALGO AND SAMUEL OLIVERA,***

**Petitioners,**

**vs.**

***UNITED STATES OF AMERICA,***

**Respondent.**

## *APPENDIX TO PETITION FOR CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR PETER HIDALGO AND SAMUEL OLIVERA
2420 CORAL WAY
MIAMI, FLORIDA 33145
TELEPHONE: (305) 854-8529

# TABLE OF CONTENTS


- Eleventh Circuit Opinion affirming District Court Order entered December 8, 1999 ..... 1-4

- Motion for Reconsideration of Defendant Hidalgo's Second Motion for New Trial, Motion for Evidentiary Hearing, and Supplement to Motion to Compel Production of Tape Recordings from FDC ..... 5-12

- District Court Order Denying Motion for Reconsideration of Order Denying Motion for New Trial, entered February 19, 1997 13-14

- District Court Order denying all pending motions not otherwise ruled upon, as moot, entered on May 6, 1997 ..... 15

- Motion for Clarification of Order of May 6, 1997 Dismissing as Moot "All Pending Motions Not Otherwise Ruled Upon" and Request for Status Conference,

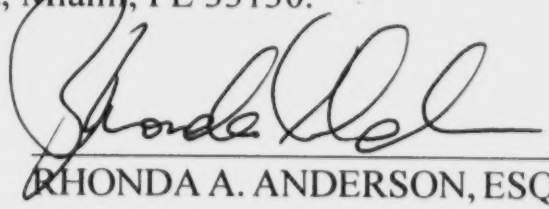
filed May 15, 1997 ..... 16-20

- District Court Order On Defendant Hidalgo's Motion for Clarification of Order of May 6, 1997 Dismissing As Moot "All Pending Motions Not Otherwise Ruled Upon," entered on July 25, 1997 ..... 21-22

- Motion for New Trial Based On Newly Discovered Evidence of Tampering With Physical Evidence and False Testimony at Trial, and Request for Evidentiary Hearing, filed on February 20, 1996 ..... 23-35

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 15th day of May, 2000, to: ***Solicitor General,*** Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; ***Edward Sanchez, Esq., Assistant United States Attorney,*** 99 N.E. Fourth Street, Miami, Florida 33131, and to the ***Office of the U. S. Attorney, Appellate Division,*** Attn: Kathleen M. Salyer, Esq., 99 N.E. 4th Street, Miami, FL 33130.



RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
Counsel for *Peter Hidalgo* and *Samuel Olivera*
2420 Coral Way
Miami, Florida 33145
Florida Bar No. 708038
Telephone: (305) 854-8529
Facsimile: (305) 858-8406

197 F.3d 1108

UNITED STATES of America, Plaintiff-Appellee,
v.
Perdro HIDALGO, a.k.a. Pedro Hidalgo, a.k.a. Peter Hidalgo,
a.k.a. Pedro Alvarez, a.k.a. Pedro Alvarez-Hidalgo, a.k.a.
"Petey", a.k.a. "El Flaco", Samuel Olivera, a.k.a. El Bobo,
Andres Campillo, a.k.a. Andy, Defendants-Appellants.
United States of America, Plaintiff-Appellee,
v.
Andres Campillo, a.k.a. Andy, Defendant-Appellant.

Nos. 96-4298, 97-5310 and 97-5316.
United States Court of Appeals,
Eleventh Circuit.
Dec. 8, 1999.

Defendants were convicted on multiple drug and firearm charges by the United States District Court for the Southern District of Florida, No. 92-571-CR-WDF, Wilkie D. Ferguson, Jr., J. Defendants appealed. The Court of Appeals, Barkett, Circuit Judge, held that co-conspirator was victim for purposes of Sentencing Guideline allowing enhancement for restraint of victim.

Affirmed.

1. CRIMINAL LAW K 1254
110 ----
110XXIX Sentencing Guidelines
110XXIX(B) Adjustments to Offense Levels
110k1254 Other particular grounds.
C.A.11 (Fla.) 1999.

Co-conspirator was "victim" for purposes of Sentencing Guideline allowing enhancement for restraint of victim, where the other conspirators restrained co-conspirator because they suspected him of betraying them, and the co-conspirator rejoined the conspiracy after he was released. U.S.S.G. § 3A1.3, 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. CRIMINAL LAW K 154
110 ----
110X Limitation of Prosecutions
110k151 Exceptions and Suspension
110k154 Concealment of offense.
C.A.11 (Fla.) 1999.

Sentencing Guideline allowing enhancement for restraint of a victim contemplates the restraint of any victim, co-conspirator or otherwise. > U.S.S.G. § 3A1.3, 18 U.S.C.A.

G. Richard Strafer, Miami, FL, for Hidalgo.

Rhonda A. Anderson, Miami, FL, for Olivera.

Harriett R. Galvin, Phillip DiRosa, Miami, FL, for Plaintiff-Appellee in docket Nos. 96-4298 and 97-5316.

Eduardo I. Sanchez, Asst. U.S. Atty., Miami, FL, for Plaintiff-Appellee.

Dawn Bowen, Asst. U.S. Atty., Howard M. Srebnick, Miami, FL, for Plaintiff-Appellee in docket No. 97-5310.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL (FN*), Senior District Judge.

BARKETT, Circuit Judge:

Appellants Peter Hidalgo, Samuel Olivera, and Andres Campillo appeal their convictions and sentences on multiple federal drug and firearm charges. For a variety of reasons, each appellant seeks to have his conviction overturned and his sentence vacated. Based upon the record in this case,

and having considered the arguments of the parties, we find no reversible error.

[1] [2] We find one sentencing issue meriting discussion. Appellants contend that the district court erred in enhancing their sentence by two levels for "restraint of a victim" under § 3A1.3 of the Federal Sentencing Guidelines. The victim in this case was a co-conspirator who was suspected of betraying the other defendants, and who rejoined the conspiracy after he was released. The appellants argue that, as a matter of law, a co-conspirator may not be considered a victim under this provision in the guidelines. We disagree, finding that the guideline provision allowing enhancement for restraint of a victim contemplates the restraint of any victim, co-conspirator or otherwise. Accordingly, we affirm the appellants' convictions and sentences.

AFFIRMED.

FN* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** | **CASE NO. 92-571-CR-FERGUSON** |
| | **MAGISTRATE JUDGE BROWN** |
| **Plaintiff,** | **MOTION FOR RECONSIDERATION OF DEFENDANT HIDALGO'S SECOND MOTION FOR NEW TRIAL AND MOTION FOR EVIDENTIARY HEARING THEREON, AND SUPPLEMENT TO MOTION TO COMPEL PRODUCTION OF TAPE RECORDINGS FROM FDC** |
| **vs.** | |
| **PETER HIDALGO,** | |
| **Defendant.** | |

THE DEFENDANT, PETER J. HIDALGO, by and through undersigned counsel, moves this Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure and Rule 615 of the Federal Rules of Evidence, to reconsider his second motion for new trial, and supplements his motion to compel production of tape recordings from FDC. In support thereof, the Defendant would state:

**I. PROCEDURAL HISTORY:**

On November 1, 1995, the Defendant filed a Second Motion for New Trial [D.E. 410] together

with an Emergency Motion for Order Preserving Tape Recordings at FDC [D.E. 409]. On November 1, 1995, this Court entered an Order granting the Defendant's emergency motion to preserve tape recordings at FDC. [D.E. 416].

On November 21, 1995, the Defendant filed a Motion to Compel Production of Tape Recordings from FDC [D.E. 426]. The docket, however, does not reflect that this motion was ruled upon.

During the sentencing hearings on February 13, 1996, this Court entered an Omnibus Order denying the Defendant's Second Motion for New Trial. [D.E. 458]. However, the Court, in its discussion of the merits of the motion, invited the Defendant to file this motion for reconsideration within 12 months, if he obtained affidavits from the witnesses to support the events alleged in the motion. The Court stated:

> This motion that you -- the fact that you offer as the basis for the motion -- could it not be substantiated [sic] than something more than on information and belief? The people who gave the

> information, will they prepare affidavits? Why not?....
>
> I am saying essentially that I don't believe there has been enough jpresented [sic] by way of motion to justify expanding the record. But you have 12 months to do it.

(Transcript of Sentencing, February 13, 1996, pp. 13, 17)(*See,* excerpt of transcript attached hereto as Exhibit "A").

## II. ADDITIONAL GROUNDS FOR NEW TRIAL & SUPPLEMENT TO MOTION TO COMPEL:

### A. Affidavits of Lazaro Diaz and Ralph Linero:

After this Court entered its Order denying the Defendant's second motion for new trial based on a violation of Rule 615 of the Federal Rules of Evidence, the Defendant obtained affidavits executed by Lazaro Diaz and Ralph Linero, which support the

allegations set forth in the Defendant's second motion for new trial.

**(1) Lazaro Diaz:** The Affidavit of Lazaro Diaz, which is attached hereto as Exhibit "B," establishes that Mr. Diaz allowed the Government's star witness, Gilberto Morales, to use his "pin" number during the latter part of August, 1995, before Morales testified. After Morales used the "pin" number to make a telephone call, he told Lazaro Diaz that he called Agent Rodriguez to discuss his concerns and the impact of the defendants herein having subpoenaed his wife and sister to testify at trial. Morales told Mr. Diaz that they discussed the "appropriate reaction" to the subpoenas.

**(2) Ralph Linero:** Ralph Linero's Affidavit, which is attached hereto as Exhibit "C," corroborates the Affidavit of Lazaro Diaz and sheds further light on the nature of the telephone conversation. In his affidavit, Ralph Linero states that he overheard Gilberto Morales ask another inmate to use his "pin" number, and thereafter engage in a conversation with Agent Ralph Rodriguez. In that conversation, Mr. Linero overheard Morales discussing with Agent

Rodriguez his concerns about his testimony. The Affidavit further recites that the Mr. Linero was aware that he executed the Affidavit "under fully penalty of perjury, and pursuant to Title 28 United States Code §1746 that all of the above is true and correct to the best of my knowledge and belief..." *See* Affidavit attached hereto as Exhibit "C."

**B. Refusal of the Federal Detention Center, in This Case, to Provide Copies of Preserved Taped Conversations:**

As set forth in the Defendant's Motion to Compel Production of Tape Recordings from FDC, defendant's counsel caused a subpoena to be served upon the Custodian of Records of the FDC. However, on November 16, 1995, an attorney representing the FDC, Kelly Tirik wrote a letter announcing that the FDC did not intend to comply with the subpoena because the "material is complied only to preserve the security and orderly operation of its correctional institutions and to protect the public." As set forth in the Defendant's motion to compel, such a purpose is not prohibited under 28 C.F.R. §§ 16.23(a) or 16.26(b), nor is it prohibited by Title III

of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq*, since inmates consent to the monitoring. *See, United States v. Noriega,* 764 F. Supp. 1480, 1490-91 (S.D. Fla. 1994). *Accord, United States v. Willoughby,* 860 F.2d 15, 19-20 (2d Cir. 1988), *cert. denied,* 488 U.S. 1033 (1989).

**C. Other Cases in Which the Federal Detention Center has Provided Copies of Taped Conversations:**

Moreover, any claim that the FDC may have that inmate conversations that are routinely taped may not be disclosed as they are "compiled only to preserve the security and orderly operation of its correctional institutions and to protect the public" is invalidated by its routine practice of providing the same type of materials the Defendant subpoenaed in other cases. For instance, the FDC recently provided the Government with copies of taped inmate telephone conversations in *United States v. Confessor Perez,* Southern District of Florida Case No. 96-0218-Cr-Moreno. Thus, the FDC's claim that disclosure of the tapes would affect the security and orderly operation of the institution is without merit.

## III. CONCLUSION:

The Defendant requests that this Court reconsider his second motion for new trial, enter an order setting this matter for an evidentiary hearing, and enter an order compelling the FDC to immediately provide copies of the subpoenaed tapes to defense counsel so that the tapes may be transcribed before an evidentiary hearing in this matter.

Respectfully submitted,

RHONDA A. ANDERSON, P.A.

Rhonda A. Anderson, Esq.
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 858-8406
Florida Bar No: 708038

## Certificate of Service

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 17th day of October, 1996, to **Assistant United States Attorney Richard E. Getchell, Esq.**, 99 N.E. Fourth Street, Miami, Florida 33132, **Howard M. Srebnick, Esq.,** Suite 1300, 201 South Biscayne Boulevard, Miami, Florida 33131; **Jose M. Quiñon, Esq.**, 2400 South Dixie Highway, Miami, Florida 33133; **Nancy Wear, Esq.,** 334 Minorca, Suite 100, Coral Gables, Florida 33134, **Lawrence E. Besser, Esq.,** 1925 Brickell Avenue, Suite D207, Miami, Florida, and **Emmanuel Perez, Esq.,** 2121 Ponce De Leon Boulevard, Suite 240, Coral Gables, Florida 33134

By:_____
RHONDA A. ANDERSON, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 92-571-CR-FERGUSON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER HIDALGO,

Defendant.

_____/

**ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR NEW TRIAL**

THIS CAUSE is before the Court on a Motion For Reconsideration Of The Second Motion For New Trial and Motion For Evidentiary Hearing. As grounds for a new trial, the defendant alleges a violation of Rule 615 of the Federal Rules of Evidence.

Rule 615 provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses...."

The claimed violation of Rule 615 in this case is that a Government witness called the lead Government agent to discuss his concern about the witness testifying at the defendant's trial and concern that the defendant had subpoenaed the witness's wife and sister to testify at trial. Even if the acts complained of constituted violations of the rule, they are legally insufficient as grounds for setting

aside the jury verdict and judgment. There is no suggestion that the agent conveyed to the witness the testimony of other witnesses or that the agent influenced the witness to testify in a certain fashion in light of other testimony in the case. Therefore,

The Motion For Reconsideration Of The Second Motion For New Trial and the Motion For New Trial and the Motion For An Evidentiary Hearing are **DENIED.**

**DONE AND ORDERED** in Chambers, at Fort Lauderdale, Florida, this 19th day of February, 1997.

WILKIE D. FERGUSON, JR.
United States District Judge

copies provided:
Richard E. Getchell, Esq.
Lawrence Besser, Esq.
Howard M. Srebnick, Esq.
Jose M. Quinon, Esq.
Emmanuel Perez, Esq.
Rhonda A. Anderson, Esq.
Nancy Wear, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 92-571-CR-FERGUSON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER HIDALGO,

Defendant.
_____/

**ORDER**

The Court having denied Defendant's Motion for Reconsideration of order Denying Motion for New Trial filed February 19, 1997, it is

**ORDERED AND ADJUDGED** that all pending motions not otherwise ruled upon are dismissed, as moot.

**DONE AND ORDERED** in Chambers, at Fort Lauderdale, Florida, this 6th day of May, 1997.

_____
WILKIE D. FERGUSON, JR.
United States District Judge

_____

1 The quotation of the Court in the Motion for Reconsideration of Hidalgo's Second Motion for new Trial, particularly "But you have 12 months to do it" is a court reporter error. It is unfathomable that the Court would have allowed a year to gather information to support a post-trial motion in a case that was already four years old. The statement of the Court was "But you have had 12 months to do it." Nevertheless, the correction is not determinative in the ruling.

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** | **CASE NO. 92-571-CR-FERGUSON MAGISTRATE JUDGE BROWN** |
| **Plaintiff,** | **MOTION FOR CLARIFICATION OF ORDER OF MAY 6, 1997 DISMISSING AS MOOT "ALL PENDING MOTIONS NOT OTHERWISE RULED UPON" AND REQUEST FOR STATUS CONFERENCE** |
| **vs.** | |
| **PETER HIDALGO,** | |
| **Defendant.** | |

THE DEFENDANT, PETER J. HIDALGO, by and through undersigned counsel, moves this Court to clarify its Order of May 6, 1997 dismissing, as moot "*all pending motions* not otherwise ruled upon," and in support thereof would state:

1. On February 10, 1997, Peter Hidalgo filed an Emergency Motion to Preserve Tape Telephone Conversations at F.D.C.-Miami requesting that the recordings under the P.I..N. Number of Lazaro Diaz during a specific time period be preserved for the purposes of appeal until further order of this Court, and provided the Court a proposed Order consistent therewith.

2. Several days thereafter, Peter Hidalgo filed an *Amended* Emergency Motion to Preserve Tape Telephone Conversations at F.D.C.-Miami, along with a proposed order, merely adding the recordings under the P.I.N. Number of Gilberto Morales, because undersigned counsel inadvertently omitted Morales' name from the first emergency motion. The recordings under the P.I.N. Numbers of both Diaz and Morales were the subject of Hidalgo's "second motion" for new trial based upon a violation of Rule 615 of the Federal Rules of Evidence which were filed on November 1, 1995 and October 17, 1996 [D.E. 410, 546], and were included in this Court's original Order preserving the tape recordings at FDC entered on November 1, 1995. [D.E. 416].

3. However, this Court never entered an Order granting or denying Hidalgo's Amended Emergency Motion to Preserve Tape Telephone Conversations at F.D.C.-Miami. Moreover, while this Court's Order dismissing as moot all pending motions only refers to the Order filed on February 19, 1997, the broad language employed in the succeeding paragraphs leaves Hidalgo uncertain whether this Court is

referring to merely his *amended* motion[5] to preserve the taped conversations at the Federal Detention Center, or other post trial motions for new trial and discovery which are totally unrelated to the issues raised in Hidalgo's Second Motion for New Trial filed in November of 1995 and Motion for Reconsideration filed in October, 1996. Moreover, Hidalgo never filed a motion for *reconsideration* of this Court's February 19, 1997 Order Denying Motion for New Trial. Therefore, Hidalgo is uncertain whether this Court's order dismissing as moot all other pending motions is a nullity, as it refers to a motion that was never filed, or will be construed as operating to dismiss his other pending motions which are separate and distinct from the issues raised regarding the violation of F.R.E. 615. Those motions include:

(1) Motion for New Trial Based on Newly Discovered Evidence of Tampering with Physical

---

[5] The Court's Order of May 6, 1997, states that it rules upon a motion for *reconsideration* of an Order entered on February 19, 1997. However, Hidalgo never filed a motion for *reconsideration* of this Court's February 19, 1997; only an *amended* motion seeking preservation of certain tapes pending appeal.

Evidence and False Testimony at Trial, and Request for Evidentiary Hearing filed on February 20, 1996 , and responses thereto [D.E. 459,481, 527, 528, 535] for which no specific order has been entered granting, denying or dismissing same.

(2) Motion for Production of Specific Documents Consisting of Exculpatory and Impeaching Information filed on November 27, 1996 and responses thereto [D.E. 554, 555, 556], for which no specific order has been entered granting, denying or dismissing same.

(3) Motions to adopt [D.E. 545] motions of codefendants [D.E. 461, 462, 484, 523, 531, 541, 544][6] for which no specific order has been entered granting, denying or dismissing same.

WHEREFORE, the Defendant moves this Court to clarify its Order of May 9, 1996, and hold a status conference as to the posture of the motions listed in items one through three above.

**Certificate of Service**

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 16th day of May, 1997,

---

[6] The motions adopted are entered as Docket Numbers 461, 462, 484, 523, 531, 541 and 544.

to **Assistant United States Attorney Richard E. Getchell,** Esq., 99 N.E. Fourth Street, Miami, Florida 33132, **Howard M. Srebnick, Esq.,** Suite 1300, 201 South Biscayne Boulevard, Miami, Florida 33131; **Jose M. Quiñon, Esq.**, 2400 South Dixie Highway, Miami, Florida 33133; **Lawrence E. Besser, Esq.,** 1925 Brickell Avenue, Suite D207, Miami, Florida, and **Emmanuel Perez, Esq.,** 2121 Ponce De Leon Boulevard, Suite 240, Coral Gables, Florida 33134

RHONDA A. ANDERSON, P.A.
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 858-8406

By: _____
RHONDA A. ANDERSON, ESQ.
Florida Bar No.708038

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** | **CASE NO. 92-571-CR-FERGUSON** |
| **Plaintiff,** | **MAGISTRATE JUDGE BROWN** |
| **vs.** | **ORDER ON DEFENDANT HIDALGO'S MOTION FOR CLARIFICATION OF ORDER OF MAY 6, 1997 DISMISSING AS MOOT "ALL PENDING MOTIONS NOT OTHERWISE RULED UPON"** |
| **PETER HIDALGO,** | |
| **Defendant.** | |

THIS CAUSE, having come on to be heard upon Defendant, PETER J. HIDALGO's Motion for Clarification of Order of May 6, 1997 Dismissing as Moot "all Pending Motions Not Otherwise Ruled Upon" And Request for Status Conference [D.E. 575] filed on May 19, 1997, and the Court having been apprised in the premises, it is hereby,

ORDERED AND ADJUDGED that this Court's Order of May 6, 1997 denied the following motions of Defendant Hidalgo as moot: Motion for New Trial Based Upon Newly Discovered Evidence of Tampering With Physical Evidence and False Testimony at Trial, and Request for Evidentiary Hearing filed on February 20, 1996 [D.E. 459],

Motion for Production of Specific Documents Consisting of Exculpatory and Impeaching Information filed on November 27, 1996 [D.E. 554], Amended Emergency Motion to Preserve Tape Telephone Conversations at F.D.C.-Miami. [D.E. 561] filed on February 13, 1997, and all of Hidalgo's various motions to adopt the motions of codefendants which were filed as Docket Entry Numbers 461, 462, 484, 523, 531, 541, and 544.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 25th day of July, 1997.

HON. WILKE D. FERGUSON
District Court Judge

cc: Richard Getchell, Esq.
Jose Quinon, Esq.
Richard Strafer, Esq.
Rhonda A. Anderson, Esq.
Lawrence E. Besser, Esq.
Howard Srebnick, Esq.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** | **CASE NO. 92-571-Cr-Ferguson** |
| **Plaintiff,** | **MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE OF TAMPERING WITH PHYSICAL EVIDENCE AND FALSE TESTIMONY AT TRIAL, AND REQUEST FOR EVIDENTIARY HEARING** |
| **vs.** | |
| **PETER HIDALGO,** | |
| **Defendant.** | |

THE DEFENDANT, PETER J. HIDALGO, by and through undersigned counsel, moves this Court pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to grant him a new trial, and in support thereof, would state:

**Introduction:**

This motion is based upon subsequently discovered proof that Special Agent Ralph Rodriguez falsely testified at trial and tampered with physical evidence in an effort to bolster the case against the Defendant. Ralph Rodriguez was the sole witness at trial that testified that HIDALGO was present at the marina when the coconspirators met. No other testimonial evidence existed to show that HIDALGO participated in the narcotics charges in the

Indictment. As a result, the weight of the evidence against Defendant HIDALGO heavily depended upon the credibility of Ralph Rodriguez. Thus, evidence showing that Agent Rodriguez tampered with evidence and falsely testified regarding how he altered the evidence, is material and requires the granting of a new trial. the Government witnesses, there is a reasonable likelihood that had the jury known that Agent Ralph Rodriguez had testified falsely regarding such a fact, that such evidence could have affected the judgment of the jury.[7]

**Statement of Facts:**

1. At the trial of this matter, the Government introduced photographs and testimony that the defendants caused certain damage to vehicles, including the right (passenger's) side headlight on a Pontiac Bonneville. One of the photographs the Government Agents took of the headlight indicates that a small area of the headlight lens glass was damaged, whereas other photographs indicate that a much larger area of the same lens was damaged. (See Composite Exhibit "A1-6").

2. The Defendant, Peter J. Hidalgo, recalls that the trial testimony of Special Agent Ralph Rodriguez indicated that the change caused to the headlight lens in the

---

[7] See discussion of proper standard to be applied *infra.*

photograph showing greater damage was due to Agent Rodriguez flicking the glass out with his finger.[8]

3. Due to the testimony of Agent Ralph Rodriguez, subsequent to the trial of this matter, two replacement headlights were purchased for a Pontiac Bonneville, and submitted to Miles Elliott Moss, P.E. to determine the amount of force necessary to break the glass to such a headlight lens. Mr. Moss concluded that a moderate force was necessary when the glass was hit with an external force. (See Composite Exhibit "B").

4. Further, undersigned counsel would submit that the glass in the headlight lens is one-quarter (1/4) of an inch thick in most areas, and three-eighths (3/8) of an inch thick

---

[8] As the undersigned was not trial counsel, and the undersigned is not aware of any other counsel with a recollection of such testimony, this allegation is based upon the Defendant's sole recollection. However, the trial transcript has been ordered for the purposes of appeal, and this portion of the Agent testimony will be submitted as a supplemental exhibit to this motion once the transcript is complete. Therefore, it is respectfully requested that the disposition of this motion be abated until such time as the trial transcript is completed.

in its thinnest region. Due to the thickness and apparent strength of the glass, the undersigned would submit that assuming that one could break the glass with their bare hands, that it would cause a severe laceration.[9]

5. The testing conducted by Miles Moss, P.E. and the apparent thickness of the glass in the headlight lens of a Pontiac Bonneville indicate that Agent Ralph Rodriguez testified falsely at trial. Such testimony was crucial for the Government to show that the defendant was a violent and active participant in the narcotics crimes charged in the Indictment. Further, the Defendant was not aware before trial that Agent Ralph Rodriguez would testify that he "flicked" the glass out of the lens with his finger. As a result, the Defendant was not able to confront such testimony at trial by conducting a demonstration of the strength of the glass before the jury, which would have indicated that the Agent had testified falsely regarding this fact. Such impeachment was crucial for the Defendant to impeach the overall credibility of the Agent.

6. The factual allegations of previous motions filed in this cause alleging misconduct by Agent Rodriguez and

---

[9] The Defendant intends to submit the replacement headlight to Mr. Moss for further testing to substantiate this allegation, at which time this motion will be supplemented.

Agent Lucas, the Defendant are hereby adopted as additional grounds for a new trial.

**MEMORANDUM OF LAW**

A motion for new trial based on newly discovered evidence must be granted where the Defendant movant satisfies the following five part test: (1) the evidence was not discovered until after trial; (2) the movant exercised due diligence to discover the evidence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material to issues before the court, and (5) the evidence was of such nature that a new trial would probably produce a new result. *United States v. Reed,* 887 F.2d 1398 (11th Cir. 1989) *cert. denied,* 110 S.Ct. 1136.

However, the strict standard for materiality is relaxed where the prosecutor knowingly uses or allows perjured testimony to remain uncorrected. In *United States v. Alzate,* 47 F.3d 1103 (11th Cir. 1995), the Eleventh Circuit explained:

> a different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the

> judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added); *accord Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois,* 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959). As the Supreme Court has held, this standard of materiality is equivalent to the *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), "harmless beyond a reasonable doubt" standard. *Bagley,* 473 U.S. at 679 n. 9, 105 S.Ct. at 3382 n. 9.

*Alzate,* 47 F.3d at 1110.(footnote omitted).[10]

---

[10] Although the Defendant is presently not aware of any specific evidence showing that the prosecutor was aware that Agent Rodriguez' testimony was perjurious such as that encountered in *Alzate* through the Agent's forthright response to questioning, both tests are set forth in this motion to provide the Court with a complete statement of the appropriate tests.

**Materiality:**

Ordinarily, newly discovered impeachment evidence is not material because it does not refute an essential element of the government's case. However, in instances where impeachment evidence is so powerful that, if it were to be believed by the jury, it could render witness' testimony totally incredible, a new trial must be granted if the witness provided an essential element of the government's case, and the witness' testimony was uncorroborated as to that essential element. *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992). The *Davis* court summarized that "[i]f newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the "interest of justice" would support a new trial under Rule 33." 960 F.2d at 825.

The Seventh Circuit similarly examined this point in *United States v. Taglia*, 922 F.2d 413 (7th Cir. 1991). The court stated:

> Nothing in the text or history of Rule 33, or of the cognate civil rule (Rule 60(b)), supports a categorical distinction between types of evidence; and we cannot see the sense of such a distinction. If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be

> utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted. The "interest of justice," the operative term of Rule 33, would require no less....
>
> The judicial language that seems to exclude impeaching testimony from the scope of Rule 33 thus illustrates the tendency to overgeneralize. It is easy to confuse a practice with a rule. The practice has been to deny new trials where the only newly discovered evidence was impeaching. But the practice should not be taken to imply a rule that even if the defendant proves that his conviction almost certainly rests on a lie, the district judge is helpless to grant a new trial.

*Taglia*, at 415.

In the instant case, Agent Rodriguez's testimony was crucial to identify HIDALGO as a participant in the narcotics conspiracy. No other individual saw HIDALGO at the Marina, not even the informants who were present at

the Marina; only Agent Rodriguez. The remainder of the testimony from other witnesses indicated that HIDALGO participated in a subsequent conspiracy to kidnap, but not the narcotics conspiracy. As a result, Agent Rodriguez's testimony was uncorroborated on an essential element of the narcotics charges: HIDALGO's presence and participation. Therefore, the evidence showing that Agent Rodriguez lied when he stated that he merely flicked the remaining glass out with his finger would be of equivalent to testimony that an agent engaged in stealing money from drug dealers. *See, Davis.* Both show that the respective agents engaged in illegal acts. Here, Agent Rodriguez tampered with evidence, and his testimony indicates a need to conceal his actions. Further, it shows that Rodriguez was willing to perjure himself in order to secure the conviction of the Defendant. Thus, where a witness such as Rodriguez provides the only testimony that a defendant participated in narcotics charges, and such is uncorroborated by other individuals present, the witness' testimony becomes entirely suspect. Had the jury known that Agent Rodriguez engaged in evidence tampering and testified falsely, the judgment of the jury may have been affected and the verdict may have been different. The jury should have been afforded the opportunity to hear this evidence, and the interests of justice require the granting of a new trial. *See, Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115, 76

S.Ct. 663, 100 L.Ed. 1003 (1956)(that there is ample innocent testimony to support the findings does not remove the taint created when it is alleged that findings are in part the product of witnesses who have perjured themselves in a similar proceeding).

**Request for Discovery and Evidentiary Hearing:**

Due to the nature of the allegations herein and in prior motions regarding misconduct in this cause committed by Agents Rodriguez and Lucas, the Defendant hereby requests discovery and an evidentiary hearing regarding each allegation. A defendant's right to discovery and an evidentiary hearing was set forth in *United States v. Espinosa,* 918 F.2d 911 (11th Cir. 1990). In *Espinosa,* the defendant alleged that subsequent to his trial, one of the agents, Urso, was indicted for making false statements on his federal job application regarding his past use and sale of drugs, and was under investigation for his participation in the escape from federal custody of an incarcerated confidential informant and his alleged distribution of cocaine. The District Court denied Espinosa's motion for discovery and new trial, and concluded that the newly discovered evidence would be purely impeaching, and in any event, unlikely to lead to a different outcome at trial. The Eleventh Circuit concluded that the District Court abused its discretion in denying the motion for discovery and in denying the motion for new trial without first conducting an evidentiary hearing. The Court explained:

For example, discovery might lead to the conclusion that Urso committed perjury in Espinosa's trial or a related proceeding. It must be remembered that Espinosa alleges Urso is under investigation for his alleged participation in the escape from federal custody of an incarcerated confidential government informant with whose supervision Urso was charged. In the current case, Espinosa claims that Urso willfully secured the unavailability of another Urso-supervised informant. Discovery into the investigation might show that Urso has committed perjury in a proceeding similar to Espinosa's trial. If so, the discovered evidence would be beyond that of mere impeachment and a new trial would be necessary to "remove the taint" from Espinosa"s conviction.

Discovery might also enlighten the District Court as to when the United States Attorney's office first learned of the disturbing allegations against Urso. Depending upon when this information was learned, Espinosa might succeed in obtaining a new trial based upon the

> government's failure to disclose evidence that could have been used to impeach a government witness.
>
> We further disagree with the District Court's view of the impact this evidence might have at a second trial. True, the testimonies of other witnesses--Bottoms, Winberg, and Agrait--appear to have inflicted the greatest damage to Espinosa's defense. Yet this testimony was hotly contested by Espinosa at trial. Urso's testimony that Espinosa was anxious to complete delivery of the cocaine may have tarnished Espinosa's credibility in the eyes of the jury enough that the jury disbelieved his claims of innocence and instead believed the testimony of Winberg, Bottoms and Agrait.

*United States v. Espinosa,* 918 F.2d at 913-14 (citations omitted).

Discovery in the instant case would be of similar significance. The allegations in this motion and previous motions filed in this cause indicate that Agent Rodriguez engaged in illegal activities and obstructed justice in this case as well as other cases. Therefore, in accordance with

*Espinosa,* the Defendant is entitled to discovery and an evidentiary hearing.

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 20th day of February to Assistant United States Attorney Richard E. Getchell, Esq., 99 N.E. Fourth Street, Miami, Florida 33132, Howard M. Srebnick, Esq., Suite 1300, 201 South Biscayne Boulevard, Miami, Florida 33131; Hector Flores, Assistant Federal Public Defender, 300 North Miami Avenue, Room 321, Miami, Florida 33128; Jose M. Quinon, Esq., 2400 South Dixie Highway, Miami, Florida 33133; David Rothman, Esq., Suite 3420, First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; and Emmanuel Perez, Esq., 2121 Ponce De Leon Boulevard, Suite 240, Coral Gables, Florida 33134

RHONDA A. ANDERSON, P.A.
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 858-8406

By: _____
RHONDA A. ANDERSON, ESQ.
Florida Bar No.708038